UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: RANBAXY GENERIC DRUG APPLICATION ANTITRUST LITIGATION	MDL No. 2878
THIS DOCUMENT RELATES TO: All Cases	Master File No. 19-md-02878-NMG

JOINT STATUS REPORT FOR SEPTEMBER 11, 2019 CONFERENCE

The parties submit the following topics for discussion at the September 11, 2019 conference.[1]

I. Defendants' May 31, 2019 motions to dismiss the consolidated Direct Purchaser Plaintiffs' and End-Payor Plaintiffs' Complaints.

Defendants' motions were fully briefed as of July 23, 2019.

A. Plaintiffs' position

At the June conference, the plaintiffs understood the Court to say that *if* it was going to hold a hearing on the motions, which is usually does not,[2] it would consider doing so at the next conference. The Court has not issued a notice of hearing, and the defendants did not raise the issue again until almost 9:30 pm last night. The plaintiffs do not believe oral argument is warranted on

[1] Plaintiffs' position: Defendants added 2+ pages of argument to the joint status report on Tuesday afternoon. The plaintiffs disagree with much of it as inaccurate and irrelevant. However, cognizant of the recent docket entry asking that the parties submit a status report, the plaintiffs will not respond at length herein, but will be prepared to address those points at tomorrow's status conference. Defendants' position: Defendants did not add "2+ pages of argument," and instead responded to edits made by Plaintiffs at 10:00 AM on Tuesday morning.

[2] Of course, this view is entirely consistent with this Court's responses to the Judicial Forum Survey. *See* http://www.mad.uscourts.gov/boston/gorton.htm (indicating that a hearing on motion to dismiss is "sometimes [held] in conjunction with the scheduling conference but not usually").

the motions, and that the motions should be denied for largely the same reasons set forth in the Report & Recommendation adopted by this Court on September 7, 2016 [ECF #80] and Plaintiffs' Oppositions to Defendants' Motions to Dismiss. [ECF # 88 and 90]

B. Defendants' position

At the last conference, the Court stated that it would consider hearing argument on Defendants' motions during the September conference if it had not yet decided those motions. There was no need for the Court to issue an additional notice of hearing or for the parties to discuss the potential argument. The Court's directions were clear.

Defendants will be prepared to argue their motion to dismiss both the end-payor and direct-purchaser complaints. Argument on both is essential to efficiently resolving this case. The end-payor complaints are new; they were not addressed in the motion-to-dismiss briefing that occurred in 2016. Accordingly, the complaints present new issues that this Court did not consider in its prior motion-to-dismiss decision. Specifically, the complaints raise *state*-law claims that are both preempted by federal law and inconsistent with the relevant state statutes, as well as a federal RICO claim that is based on a legally erroneous interpretation of the mail- and wire-fraud statutes. The direct-purchaser plaintiffs have also dramatically expanded the potential damages in this case by expanding their claim to cover a new drug. Defendants believe that, in the opinion certifying the original motion-to-dismiss decision for appeal, this Court identified fatal flaws in the direct-purchaser complaints that Magistrate Judge Kelley did not properly address in her Report and Recommendation. The RICO claims in the direct-purchaser complaints also suffer from the same legal flaw as those in the end-purchaser complaints. Given the tremendous scope of discovery in this case and the likelihood that Plaintiffs seek astronomical damages, Defendants should have an opportunity to argue these dispositive legal issues so the Court can resolve them expeditiously.

II. Update on discovery progress.

The parties have made significant progress in advancing discovery in this case.

A. Production of documents

Since the last conference, Defendants have produced more than 67,000 documents responsive to the DPPs' initial and second requests for production of documents (served on October 7, 2016 and June 20, 2019, respectively). Defendants are preparing further productions of documents in response to DPPs' second request for production of documents.

The parties were also able to resolve Plaintiffs' Motion to Compel the Complete Production of the Document Set Previously Produced by Parexel without the Court's assistance. In connection with the resolution of that motion, Defendants produced approximately 18,000 documents of the production set previously produced by Parexel to the Department of Justice. The parties have had several meet and confers regarding other outstanding discovery issues and anticipate these discussions will continue and result in further progress.

B. Defendants' Privilege logs

i. Plaintiffs' Position

The parties are endeavoring to resolve any disputes before seeking the Court's guidance. Ranbaxy served a revised privilege log on May 30, 2019 and the parties have attempted to narrow or resolve issues through correspondence and a telephonic meet and confer. The parties engaged in an initial meet-and-confer on July 24, 2019; but Ranbaxy refused to participate in a follow-up call on August 2, 2019 and rejected the plaintiffs' attempts to reschedule for August 5th or 6th. Despite repeated requests from the plaintiffs, Ranbaxy has still not committed to a date certain for resolving deficiencies in the log entries provided on May 30, 2019.

On Monday night Ranbaxy provided its latest "interim" log. Although Ranbaxy indicated in an August 30, 2019 letter that it would "endeavor to complete [a review of specific examples of privilege claims questioned by the plaintiffs] in the next four to six weeks," we still do not have a date certain by which Ranbaxy will commit to producing a full and complete privilege log. Plaintiffs believe that in order to keep discovery in this case on track and properly prepare for depositions, these lingering privilege log issues must be resolved soon, and have proposed September 23, 2019 as a deadline.

The plaintiffs will continue their attempts to resolve these issues among the parties. But if the parties are unable, by September 17, 2019, to agree on an acceptable date for the production of Ranbaxy's complete log for all withheld/redacted documents the plaintiffs may have to seek the Court's intervention in setting such a date.

ii. Defendants' Position

Defendants have devoted significant resources to preparing a privilege log, which reflects the fact that many of Plaintiffs' requests seek significant amounts of privileged information. The Plaintiffs have raised a series of objections, which the parties are discussing. As the result of efforts to accommodate Plaintiffs' objections, Defendants have devoted hundreds if not thousands of hours to clarifying and reconsidering certain privilege determinations. In addition to these efforts to resolve Plaintiffs' objections, which Defendants do not believe are meritorious, Defendants are also in the process of logging privileged documents in response to new discovery requests by Defendants. This has been a significant undertaking and remains ongoing.[3]

[3] Plaintiffs' recitation of the parties' communications surrounding Defendants' privilege log is misleading. Plaintiffs claim that Defendants "rejected" an August 2, 2019 call. That was because Plaintiffs would not provide an agenda or topics of discussion for the proposed call, so there was no need for a call.

While Plaintiffs are now asking for a deadline for the production of a final privilege log by September 23, 2019, this request was made for the very first time on the night of September 9th, in a draft of this status report. The Plaintiffs now appear to suggest that they do not intend to raise this issue at the parties' status conference and will instead confer with Defendants. To the extent that is true, the issue should not be included in the parties' status report.

In any event, the Plaintiffs' request for a final privilege log within 13 days is unrealistic and unreasonable. Despite representing to counsel that they would make only modest additional discovery requests after consolidating their complaint, Plaintiffs have made over 60 new requests, including one incorporating their nearly 200 initial requests, which necessarily requires the review and production of tens of thousands of documents. Ranbaxy has already produced over 67,000 additional documents, and its production is ongoing. The parties have never discussed a timeline for the completion of the production of documents, and the suggestion that Defendants should be forced to complete a privilege log within 13 days is plainly unrealistic.

C. Non-party discovery

Meijer, Inc. and Meijer Distribution, Inc.'s ("Meijer") motion to compel non-party Prinston Pharmaceuticals, Inc. ("Prinston") to produce transaction-level sales data for generic Diovan remains pending before Magistrate Judge Kelley. [ECF #77]. Following a hearing on Meijer's motion, Magistrate Judge Kelley ordered the parties to continue discussions in an attempt to resolve the motion. [ECF #115]. However, the parties were unable to reach an agreement. [ECF #121]. On September 6, 2019, Magistrate Judge Kelley entered a supplemental briefing schedule concerning the relevance of Prinston's transaction-level sales data to Meijer's antitrust impact and damages models. [ECF #122].

Dated: September 10, 2019

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CERTIFICATE OF SERVICE

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Dated: September 10, 2019

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